(2)

S.
FILED
DEC 20 1996
CLERK

No. 96-866

In The

Supreme Court of the United States

October Term, 1996

ANTONIO GREY, MARTAIN THOMPKINS,

Petitioners,

vs.

KEITH MORRIS, ED KETZLER, MARK TEMNYK, and PAT MITCHELL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

DANIEL J. BERNARD
Counsel for Respondents
Wayne State University
Office of the General Counsel
4249 F.A.B., 656 W. Kirby
Detroit, Michigan 48202
(313) 577-2268

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

22 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

ARGUMENT 2

I. STANDARD OF REVIEW 2

II. PETITIONERS' CLAIMS ARE BARRED BY THE DOCTRINE OF *RES JUDICATA* 3

A. ELEMENTS OF *RES JUDICATA* 3

B. THE DOCTRINE OF *RES JUDICATA* WAS PROPERLY APPLIED TO BAR PETITIONERS' FEDERAL ACTION 4

1. THE STATE COURT ACTION WAS DECIDED ON ITS MERITS 4

2. THE ISSUES IN THE FEDERAL CASE COULD HAVE BEEN RAISED AND RESOLVED IN THE STATE CASE ... 4

3. PETITIONERS' STATE AND FEDERAL ACTIONS INVOLVE THE SAME PARTIES 5

III. PETITIONERS' CLAIMS AGAINST RESPONDENTS TEMNYK AND MITCHELL WERE PROPERLY DISMISSED 5

IV. PETITIONERS HAVE COMPLETELY MISREPRESENTED THE ISSUES BEFORE THIS COURT 6

A. PETITIONERS HAVE MISREPRESENTED THE BASIS OF THE STATE COURT DECISION 6

TABLE OF CONTENTS – Continued

Page

B. PETITIONERS HAVE MISREPRESENTED THE NATURE OF THEIR CLAIMS BEFORE THE STATE COURT..... 9

C. PETITIONERS HAVE MISREPRESENTED THE CASES CITED IN THEIR BRIEF ... 11

CONCLUSION AND RELIEF REQUESTED..... 16

TABLE OF AUTHORITIES

Page

CASES

Aben v. Dallwig, 665 F.Supp. 523 (E.D. Mich. 1987) 5

Allen v. McCurry, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980) 3, 5

Berkaw v. Mayflower Congregational Church, 378 Mich. 239 (1966) 13

Bissell v. Spring Valley Township, 124 U.S. 225, 31 L.Ed. 411, 8 S.Ct. 495 (1888) 13

Bresnahan v. Nugent, 92 Mich. 76 (1892) 12, 13

City of Mt. Clemens v. United States Environmental Protection Agency, 917 F.2d 908 (6th Cir. 1990) 2

Department of Treasury v. Campbell, 161 Mich. App. 526 (1986) 5

Dixon v. Richer, 922 F.2d 1456 (10th Cir. 1991) 9, 15

Duncan v. Peck, 752 F.2d 1135 (6th Cir. 1985) 16

Fellowship of Christ Church v. Thorburn, 758 F.2d 1140 (6th Cir. 1985) 4

Gose v. Monroe Auto Equipment Company, 409 Mich. 147 (1980) 4

Haring v. Prosise, 462 U.S. 306, 103 S.Ct. 2368, 76 L.Ed.2d 494 (1983) 15

Harsco Corp. v. Zlotnicki, 779 F.2d 906 (3rd Cir. 1985) 3

Katt v. Dykhouse, 983 F.2d 690 (6th Cir. 1992) 4

Laude v. Cossins, 334 Mich. 622 (1952) 13

TABLE OF AUTHORITIES – Continued

Page

Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) 3

Migra v. Warren City School District Board of Education, 465 U.S. 75, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984) 3

Oakley v. Michigan Department of Mental Health, 122 Mich. App. 638 (1983) 14

Palchi v. Robbins, 272 Mich. 411 (1935) 12, 13

Quick v. General Motors Corporation, Saginaw Steering Gear Division, 686 F.Supp. 1224 (E.D. Mich. 1988) 3

Roberts v. City of Troy, 170 Mich. App. 567 (1988) 12

Rodman v. Michigan Central Railroad Company, 59 Mich. 395 (1886) 12

San Joaquin County v. Dewey, 105 Mich. 122 (1981) 14

Sherrell v. Bugaski, 169 Mich. App. 10 (1988) 4

Slater v. KFC Corp., 621 F.2d 932 (8th Cir. 1980) 3

Socialist Workers Party v. Secretary of State, 412 Mich. 571 (1982) 4

Taylor v. Auditor General, 360 Mich. 146 (1960) 13

U.S. v. McGlocklin, 8 F.3d 1037 (6th Cir. 1993) 3

Wade v. City of Pittsburgh, 765 F.2d 405 (3rd Cir. 1985) 11

Wessborg v. Merrill, 195 Mich. 556 (1917) 14

Wilson v. Knight-Ridder Newspapers, Inc., 190 Mich. App. 277 (1991) 4

Xerox Corporation v. Kalamazoo, 76 Mich. App. 150 (1977) 14

STATEMENT OF THE CASE

This matter comes before the Court on Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, following that court's *per curiam* decision affirming the District Court's orders granting Respondents' motion for summary judgment and denying Petitioners' motion for reconsideration.

On February 3, 1992, Wayne State University public safety officers Mark Temnyk and Pat Mitchell responded to a possible armed robbery complaint. They reported descriptions of the alleged perpetrators, which descriptions were then relayed to other police officers. Officers Keith Morris and Ed Ketzler then observed the Petitioners, who matched precisely the descriptions given by the complainant. The Petitioners were then arrested and transported to a City of Detroit police precinct. The Petitioners were later released after the complainant changed his story.

The Petitioners filed a complaint against all four police officers in the Wayne County Circuit Court on August 18, 1993. The state court complaint alleged various violations of Michigan's constitution as well as Michigan's public accommodations statutes. On June 29, 1994, Wayne County Circuit Judge Kathleen MacDonald issued an order granting Respondents' motion for summary disposition and dismissing Petitioners' complaint with prejudice in its entirety. Petitioners did not appeal this ruling.

On October 3, 1994, Petitioners filed an action in the United States District Court for the Eastern District of Michigan, against the same Respondents, arising out of

the same incident. Petitioners sued under 42 U.S.C. § 1983, alleging violations of their First, Fourth, and Fourteenth Amendment rights.

Respondents filed a motion for summary judgment based on (1) *res judicata* and (2) the absence of any allegations against Respondents Temnyk and Mitchell. Petitioners did not file a response to the motion for summary judgment.

On April 20, 1995, Judge Patrick J. Duggan of the United States District Court issued his opinion and order granting Respondents' motion for summary judgment. Petitioners filed a motion for reconsideration on April 28, 1995. The Court permitted Respondents to file a response to this motion, which Respondents did on May 10. On July 5, 1995, Judge Duggan issued his opinion and order denying Petitioners' motion for reconsideration.

From the orders granting Respondents' motion for summary judgment and denying Petitioners' motion for reconsideration, Petitioners appealed of right to the United States Court of Appeals for the Sixth Circuit. On August 29, 1996, the Sixth Circuit issued an unpublished *per curiam* opinion affirming the decisions of the District Court.

ARGUMENT

I. STANDARD OF REVIEW

A grant of summary judgment is reviewed *de novo*. *City of Mt. Clemens v. United States Environmental Protection Agency*, 917 F.2d 908, 914 (6th Cir. 1990). The court

must examine the record, taken as a whole, to determine whether the non-moving party has raised a genuine issue of material fact. *Id.* at 913-914. See also *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1355, 89 L.Ed.2d 538 (1986).

The standard of review of the district court's denial of Plaintiffs' motion for reconsideration is limited to determining whether the trial court abused its discretion. See e.g., *Harsco Corp. v. Zlotnicki*, 779 F.2d 906 (3rd Cir. 1985); *Slater v. KFC Corp.*, 621 F.2d 932 (8th Cir. 1980).

II. PETITIONERS' CLAIMS ARE BARRED BY THE DOCTRINE OF *RES JUDICATA*.

A. Elements of *Res Judicata*.

A federal court must give the same preclusive effect to a state court judgment as given that judgment under the law of the state where the judgment was rendered. *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 81, 104 S.Ct. 892, 896, 79 L.Ed.2d 56 (1984); *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980); *U.S. v. McGlocklin*, 8 F.3d 1037, 1052-1053 (6th Cir. 1993); *Quick v. General Motors Corporation, Saginaw Steering Gear Division*, 686 F. Supp. 1224, 1228 (E.D. Mich. 1988).

Under Michigan law, there are three prerequisites to the application of the doctrine of *res judicata*: (1) the prior action must have been decided on its merits; (2) the issues raised in the second case either were resolved in the first, or through the exercise of reasonable diligence might have been raised and resolved in the first case; and (3) both actions involve the same parties or their privies.

Fellowship of Christ Church v. Thorburn, 758 F.2d 1140, 1144-1145 (6th Cir. 1985); *Socialist Workers Party v. Secretary of State*, 412 Mich. 571 (1982).

Michigan courts follow a broad application of *res judicata* to bar not only claims identical to those already litigated, but also claims arising out of the same transaction which plaintiff could have brought, but did not. *Katt v. Dykhouse*, 983 F.2d 690, 693 (6th Cir. 1992); *Gose v. Monroe Auto Equipment Company*, 409 Mich. 147 (1980).

B. The Doctrine of *Res Judicata* Was Properly Applied To Bar Petitioners' Fedaral Action.

1. The State Court Action Was Decided On Its Merits.

The Petitioners' state court action was dismissed by an order granting Respondents' motion for summary disposition. Accordingly, the state court lawsuit was decided on its merits. See e.g., *Sherrell v. Bugaski*, 169 Mich. App. 10, 17 (1988) ("[a] dismissal on motion by the defendants, after judicial consideration, as opposed to a ministerial procedural dismissal, is an adjudication on the merits"); *Wilson v. Knight-Ridder Newspapers, Inc.*, 190 Mich. App. 277, 279 (1991) ("dismissal with prejudice . . . amounted to an adjudication of the merits and bars this action").

2. The Issues In The Federal Case Could Have Been Raised And Resolved In The State Case.

Although the incident about which Petitioners complain occurred on or about February 3, 1992, Petitioners

did not file their state court action until August 18, 1993. There is no evidence to suggest – and no suggestion by Petitioners – that anything prevented them from raising their federal claims in the state court action.

State courts have concurrent jurisdiction to hear constitutional claims arising under 42 U.S.C. § 1983. See *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980); *Aben v. Dallwig*, 665 F. Supp. 523, 524, 525 (E.D. Mich. 1987); *Department of Treasury v. Campbell*, 161 Mich. App. 526, 529 (1986).

3. Petitioners' State And Federal Actions Involve The Same Parties.

This element is self evident and not disputed by Petitioners.

III. PETITIONERS' CLAIMS AGAINST RESPONDENTS TEMNYK AND MITCHELL WERE PROPERLY DISMISSED.

Respondents moved for summary judgment as to the claims against Respondents Temnyk and Mitchell on the grounds that Petitioners had not alleged any wrongful conduct on the part of Temnyk and Mitchell. The District Court granted the motion, in part, on these grounds (Opinion and Order Granting Defendants' Motion for Summary Judgment, p. 2, n. 4). Petitioners did not contest the dismissal of Officers Temnyk and Mitchell in their motion for reconsideration, they did not address the dismissal on appeal, and they have not addressed it in their petition to this Court. Accordingly, Petitioners have

waived any challenge to this portion of the District Court's order.

IV. PETITIONERS HAVE COMPLETELY MISREPRESENTED THE ISSUES BEFORE THIS COURT.

A. Petitioners Have Misrepresented The Basis Of The State Court Decision.

Petitioners' state court complaint had two counts. The first was for various violations of the Michigan Constitution. With regard to that count, the state court ruled as follows:

> Probable cause existed for the arrest of the Plaintiffs in this case. The existence of probable cause negates any claim the Plaintiff would have for false arrest and imprisonment, failure to make an adequate inquiry or investigate prior to arrest, any illegal search and seizure and any violation of due process, or any other civil rights that the Plaintiff could claim. Therefore, the motion . . . is granted.

Transcript of State Court Proceedings, p. 25.

With regard to the second count, alleging violation of the Michigan Public Accommodations statute, the state court ruled as follows:

> Plaintiff, at most here, can allege they were denied the public streets in their school. I don't think that this statute was ever meant to be extended to the point where this – where the Plaintiff argued this morning. And these Defendants did not act in violation of this statute.

> They acted under their authority and their mandate.
>
> Transcript of State Court Proceedings, p. 26.

The foregoing rulings completely disposed of Petitioners' claims. In addition to these rulings, the state court added a ruling on the defense of governmental immunity:

> As far as the governmental immunity claim, I think all of these officers are immune. The concert of action claim is also dismissed. I think there are no genuine issues of material fact in this case. Motion is granted.
>
> Transcript of State Court Proceedings, p. 26.

Despite the state court's care in rendering its opinion and the clarity of its rulings, Petitioners persist in attempting to characterize the state court judgment as one based solely on governmental immunity. To this end, Petitioners state the "Question Presented for Review" as follows:

> "Whether *State Immunity Law* Can Bar This 42 U.S.C. Sec. 1983 Action?"
>
> Petition for Writ of Certiorari, p. i (emphasis added).

This obvious misstatement of the case is not inadvertant, since Petitioners posed the issue to the Sixth Circuit as follows:

> "Did the Federal District Court err in dismissing the Plaintiff-Appellants' 42 U.S.C. Sec. 1983 action based on a prior State Court dismissal of the Plaintiffs-Appellants' previous state law action *which was dismissed pursuant to state governmental immunity?"*

Appellants' Brief to the Sixth Circuit, p. 2 (emphasis added).

Although Petitioners acknowledge the state court ruling that probable cause for the arrests of the Petitioners existed (Petition for Writ of Certiorari (hereafter Petition) at 2), Petitioners later continue to misrepresent the basis of the state court's decision and the subsequent decision of the Federal District Court. On page four of their Petition, the Petitioners state:

> In essence, the lower courts have ruled that the state judge, *through application of state governmental immunity,* could permanently deprive the Plaintiffs of the opportunity to bring the federal constitutional claims in federal court. Consequently, the lower court has taken the position that *state governmental immunity law* supersedes not only federal law but the federal Constitution. (Emphasis added).

Petitioners' state court action was not dismissed solely or even primarily on the grounds of immunity. The trial court specifically (1) found that probable cause existed for the Petitioners' arrest, thus requiring the dismissal of Petitioners' constitutional claims; and (2) rejected the allegation that Respondents had violated Michigan's Public Accommodations statute. The Petition does not simply ignore these rulings, but instead casts the state court decision in an entirely false light.

B. Petitioners Have Misrepresented The Nature Of Their Claims Before The State Court.

At several points in their Petition, Petitioners allege that the state court did not address Petitioners' excessive force claim. Petition at 3, 5-6, 7. However, in an attempt to force this case into a posture in which *Dixon v. Richer*, 922 F.2d 1456 (10th Cir. 1991), might be applicable, the Petitioners conceded that they did not bring an excessive force claim before the state court. At pages 15-16 of their brief to the Sixth Circuit, the Petitioners stated:

> "In the instant, *the Plaintiffs' excessive force claims were only brought in the federal court action.* The state court action concerned the question of unreasonable search." (Emphasis added).

A review of Petitioners' state court complaint reveals no allegation of excessive force. This contrasts with the federal court action, in which there is an express allegation of excessive force.

It is further instructive that, in describing the nature of Petitioners' state court complaint, the U.S. District Court did not observe any allegation of excessive force. Opinion and Order Granting Defendants' Motion for Summary Judgment at 1-2.

The Petitioners further mischaracterize the nature of the claims before the state court on pages 13-14 of the Petition:

> In this case, the Plaintiffs' federally protected constitutional rights were not protected in state court through Plaintiffs' reliance on state law . . . This action was brought because the state court disregarded the rights of the Plaintiffs to

> be free from an unlawful arrest and excessive force. It would turn 42 U.S.C. Sec. 1983 on its head to say that because of the state court's failure to enforce the Plaintiffs' State Constitutional Rights, their Federal Constitutional Rights claims would – because of that failure – be barred. How could Plaintiffs foresee such hostile State Court and later Federal Court reception?
>
> In this case, the state court judge did not acknowledge, let alone respect, the Plaintiffs' Federal Constitutional Rights or those similar rights purportedly protected under the State Constitution.

The foregoing is almost a verbatim reiteration of a position taken in Petitioners' brief in support of motion for reconsideration in the District Court. The District Court judge dealt with these allegations by pointing out:

> In the present case, Plaintiffs' federal claims were not "ignored" because WCCC Judge McDonald failed to protect Plaintiffs' State Constitutional Rights; Plaintiffs' federal claims were not addressed simply because *Plaintiffs* failed to bring federal claims in its [sic] original action filed in State Court.
>
> Opinion and Order Denying Plaintiffs' Motion for Reconsideration, pp. 3-4 (footnote omitted; emphasis in original).

Petitioners have not attempted to reconcile their allegations with the District Court's observations, nor have they indicated why a state court judge would expound on federal law when Petitioners had chosen not to present

any federal claims. To suggest that the state court "disregarded" or "did not acknowledge, let alone respect" Petitioners' federal rights is to mischaracterize proceedings before the state court and to present a distorted picture to this Court.

C. Petitioners Have Misrepresented The Cases Cited In Their Petition.

After reviewing the cases cited in the Petition and the propositions for which they were cited, it is difficult to know where to begin to describe the extent of the misrepresentation. For want of a better system, the cases will be addressed as they appear in the Petition.

Wade v. City of Pittsburgh, 765 F.2d 405 (3rd Cir. 1985). Petitioners describe *Wade* as "the decision which most closely approximates the instant situation." Petition at 4. Petitioners cite *Wade* for the proposition that a state court judgment based on statutory immunity does not bar a subsequent federal civil rights lawsuit. *Id.* However, the use of *Wade* incorrectly assumes that the state court judgment in the present action was based upon governmental immunity. Moreover, the Third Circuit specifically observed in *Wade* that the application of *res judicata* in Pennsylvania requires a determination on the merits, 765 F.2d at 408, and a judgment based on statutory immunity was not a decision on the merits. 765 F.2d at 410-411. In the present action, the state court clearly ruled upon the merits of the claims presented, and the Petitioners have not addressed the District Court's ruling in that regard. Opinion and Order Granting Defendants' Motion for Summary Judgment at 3-4.

Roberts v. City of Troy, 170 Mich. App. 567 (1988). Petitioners describe *Roberts* as "the case most clearly on point," demonstrating that the doctrine of *res judicata* does not bar Petitioners' federal action. Petitioners describe *Roberts* as involving "a federal court action which was clearly on the merits." However, Petitioners omit from their description of *Roberts* the fact that the state law claims which were the subject of the state court action had been dismissed by the federal court without prejudice. 170 Mich. App. at 573. The court further observed that a dismissal without prejudice is not an adjudication on the merits and will not bar a subsequent state court action. *Id.* at 577-578. In the present case, the state court action was decided on the merits and the dismissal was with prejudice. *Roberts* is inapplicable.

Rodman v. Michigan Central Railroad Company, 59 Mich. 395 (1886) (mis-cited by Plaintiffs as 49 Mich. 395). Petitioners describe *Rodman* as presenting the "same issue" as the present case. Apparently, this conclusion derives from Petitioners' misapprehension as to the meaning of a general demurrer. Of course, a general demurrer of the sort raised in *Rodman* is a procedural ruling and not a ruling on the merits of the dispute. 59 Mich. at 398-399. See also *Palchi v. Robbins*, 272 Mich. 411, 419 (1935).

Bresnahan v. Nugent, 92 Mich. 76 (1892). Petitioners describe *Bresnahan* as a "similar situation" to the present case and lift the quotation:

> An ineffectual attempt to enforce a claim which has no legal existence does not estop a party from thereafter asserting one which is valid.

Petition at 9.

What Petitioners fail to point out to the Court is that the action which the Michigan Supreme Court held was not entitled to estoppel was a lawsuit which had been dismissed without prejudice. 92 Mich. at 83-84.

Palchi v. Robbins, 272 Mich. 411 (1935). It is not clear for what purpose Plaintiffs cite *Palchi,* other than the fact that the *Palchi* court rejected a claim of *res judicata. Palchi* required the Michigan Supreme Court to determine the preclusive effect of the dismissals of two lawsuits previously filed in the California state and federal courts. In each case, general demurrers were granted, but it was not clear whether the demurrers went to the merits of the cases. The court noted "that where a demurrer goes to both defects of form and also to the merits, a judgment thereon, not designating between the two grounds, will be presumed to rest on the former." 272 Mich. at 419, quoting *Bissell v. Spring Valley Township,* 124 U.S. 225, 232; 31 L. Ed. 411; 8 S.Ct. 495 (1888). Therefore, the Michigan court reasoned that the prior demurrers did not go to the merits of the prior cases, and the California dismissals did not preclude the Michigan lawsuit.

Petitioners next cite a series of cases, without discussion, claiming that these cases support their contention that a determination on the merits was not made by the state court. These cases do not apply here. They are *Berkaw v. Mayflower Congregational Church,* 378 Mich. 239 (1966) (declining to apply the doctrine of collateral estoppel where two prior New York class actions had not decided the issue presented in the Michigan case); *Taylor v. Auditor General,* 360 Mich. 146 (1960) (Michigan Supreme Court expressly declines to consider the theory of *res judicata*); *Laude v. Cossins,* 334 Mich. 622 (1952)

(dismissal of a prior action by a court without jurisdiction to hear the case is not a bar to a subsequent lawsuit in a court of proper jurisdiction); *Wessborg v. Merrill*, 195 Mich. 556 (1917) (no discussion of *res judicata*); *Xerox Corporation v. Kalamazoo*, 76 Mich. App. 150 (1977) (Tax Tribunal not barred from hearing plaintiff's claims because prior decisions did not involve any determination on the merits).

Oakley v. Michigan Department of Mental Health, 122 Mich. App. 638 (1983) and *San Joaquin County v. Dewey*, 105 Mich. 122 (1981). It is not clear why Petitioners cite these cases. The *San Joaquin County* and *Oakley* cases do not address summary disposition on the merits, since they considered only the *res judicata* effect of accelerated judgment under the old Michigan General Court Rules of 1963[1], not summary disposition under the applicable current rule, MCR 2.116(C)(10).[2]

---

[1] GCR 1963, 116 provided in part as follows: "I. Grounds. In a party's first responsive pleading, or by motion filed not later than his first responsive pleading, a party may demand that service of process be quashed or that judgment be entered dismissing 1 or more claims asserted against him upon any of the following grounds: (1) the court lacks jurisdiction of the person or property, (2) the court lacks jurisdiction of the matter, (3) the party asserting the claim lacks legal capacity to sue, (4) another action is pending between the same parties involving the same claim, (5) the claim is barred because of release, payment, prior judgment, statute of limitations, statute of frauds, infancy, or other disability of the moving party, or assignment or other disposition of the claim before commercial of the action."

[2] MCR 2.116(C)(10) provides that summary disposition shall be ordered where, "except as to the amount of damages, there is no genuine issue as to any material fact, and the moving

Haring v. Prosise, 462 U.S. 306, 103 S.Ct. 2368, 76 L. Ed. 2d 494 (1983). Petitioners cite *Haring v. Prosise*, for the proposition that an issue not decided in a prior criminal trial could be raised by a §1983 plaintiff. Petitioners contend that *Haring* is "on all fours" with the present case since Petitioners' federal constitutional rights were not litigated in the state court. Petition at 15-16. What Petitioners fail to tell the Court is that *Haring* was decided by construing Virginia law, which provides – much more narrowly than Michigan law – that a judgment in a prior action operates as an estoppel only as to those matters actually in issue and upon which the finding or verdict was rendered. 462 U.S. at 314-315, 76 L. Ed. 2d at 604-605. By contrast, Michigan law bars the relitigation of issues which either were resolved in a prior action or through the exercise of reasonable diligence might have been raised and resolved in a prior action.

Dixon v. Richer, 922 F.2d 1456 (10th Cir. 1991). Petitioners represent the case of *Dixon v. Richer*, as "even closer to the instant situation" than *Haring*. Petition at 16. However, Petitioners do not disclose to this Court that *Dixon* depended upon an interpretation of Colorado law, which precludes litigation of an issue if the issue is "actually litigated and necessarily adjudicated" in a prior proceeding. 922 F.2d at 1459. In this regard, Colorado law is narrower than Michigan law and *Dixon* is therefore inapplicable.

---

party is entitled to judgment or partial judgment as a matter of law."

Duncan v. Peck, 752 F.2d 1135 (6th Cir. 1985). Although Petitioners allege that "*Duncan* has direct application to the facts and circumstances of this case," Petitioners neglect to advise this Court that *Duncan* applied Ohio law which is narrower than Michigan law on the breadth of *res judicata*.

CONCLUSION AND RELIEF REQUESTED

This case presents a simple and straightforward issue – under Michigan law, did the dismissal of Petitioners' lawsuit on the merits bar a subsequent lawsuit arising out of the same transaction and occurrence? In their petition to this Court, Petitioners do not address any of the cases cited by Respondents in their motion for summary judgment in the trial court, any of the cases cited by the trial court in its opinions, or any of the cases or reasoning of the Court of Appeals. Instead as they did in the lower courts, Petitioners attempt to rely upon a misrepresentation of the issues decided by the state court, a misrepresentation of the issues presented to the state court, and a misrepresetation of the cases cited in their petition.

Petitioners do not so much as mention the alternative grounds for dismissal of the complaint as to Respondents Temnyk and Mitchell, namely that there has been no allegation of any wrongdoing.

For the foregoing reasons, Respondents pray that this Honorable Court will deny the petition for writ of certiorari.

Respectuflly submitted,

DANIEL J. BERNARD
Counsel for Respondents
Wayne State University
Office of the General Counsel
656 W. Kirby, 4249 F.A.B.
Detroit, MI 48202
(313) 577-2268